

ORIGINAL

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

2009 OCT 22 AM 9:15 ✓

IN AND FOR THE COUNTY OF YAVAPAI

JEANNE HICKS, CLERK

Heather Figueroa

BY: _____

THE STATE OF ARIZONA,)

Plaintiff,)

vs.)

No. CR 2008-1339

STEVEN CARROLL DEMOCKER,)

Defendant.)

BEFORE: THE HONORABLE THOMAS B. LINDBERG
JUDGE OF THE SUPERIOR COURT
DIVISION SIX
YAVAPAI COUNTY, ARIZONA

PRESCOTT, ARIZONA
TUESDAY, OCTOBER 20, 2009
10:00 A.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
PROBABLE CAUSE HEARING ON AGGRAVATING CIRCUMSTANCES

TESTIMONY OF DR. PHILLIP KEEN

ROXANNE E. TARN, CR
Certified Court Reporter
Certificate No. 50808

OCTOBER 20, 2009
10:00 A.M.

APPEARANCES:

FOR THE STATE, MR. JOE BUTNER.
FOR THE DEFENDANT, MR. JOHN SEARS.

THE COURT: This is the time set for
evidentiary hearing in the State versus Steven Carol
Democker, CR 2008-1339, in connection with the Chronis versus
Steinle probable cause hearing on aggravating circumstances
allegations.

State ready to proceed?

MR. BUTNER: State is ready, your Honor.

THE COURT: Defense ready to proceed?

MR. SEARS: Your Honor, I am, and as I
indicated in chambers, I would ask for an opportunity to be
heard on some evidentiary matters before we proceed.

THE COURT: Go ahead.

MR. SEARS: Thank you.

Judge, we were concerned enough, when we
were last before you, about the way in which disclosure was
coming to us, that we asked you to enter a separate order
regarding a discovery cutoff for matters to be raised today
at this hearing. And you did so, and ordered that the State
end its disclosure with respect to this hearing on October
2nd of this year.

And in the period of time between that

1 court hearing of October 2nd, we received several items. And
2 I am advised by Mr. Butner yesterday and again today, that
3 specifically he has Dr. Keen here ready to testify and
4 Mr. Echols from Rocky Mountain Information Network to
5 testify. And I have some concerns. I'm going to ask you
6 this morning, Judge, to enter some orders limiting the
7 testimony and evidence that those witnesses would be
8 permitted to give in this proceeding.

9 With respect to Mr. Echols -- now,
10 Mr. Echols, by disclosure, began to work on this case in
11 early September of 2008. Despite repeated requests from us
12 for information provided to him, for information from him, we
13 heard not a word from Mr. Echols until the 30th of
14 September -- just a couple of days before the Court's
15 deadline for disclosure in this matter.

16 And what Mr. Echols provided to
17 Detective McDormett, which was then disclosed to us at Bates
18 No. 10600, was a four-page report on the Rocky Mountain
19 Information Network. And we filed, yesterday afternoon, a
20 memorandum regarding the applicability of Rule 702 and the
21 question of whether or not this report, in and of itself,
22 without live testimony, would be admissible in this Chronis
23 proceeding, and provided a copy to the Court in chambers
24 yesterday afternoon. Let me see if I can simplify my
25 argument here.

1 Mr. Echols has been purported to us in
2 disclosure to be a forensic accountant who was given
3 information regarding the financial dealings between
4 Mr. Democker and the victim in this case and the divorce and
5 other related matters, including tax matters, for analysis
6 and comment. What he has provided by way of a written report
7 doesn't address any of that; provides no new information
8 regarding allegations that Mr. Casalena, the wife's retained
9 expert in the divorce proceeding; made, no specific
10 reference to documents that he alleges are fraudulent or
11 false or contained information made under penalty of
12 perjury.

13 Instead, Mr. Echols, in general terms,
14 has talked about what people think, including what
15 Mr. Democker thinks, what Mr. Democker knows, what
16 Carol Kennedy knew, what the e-mail traffic between the two
17 of them indicated, and has rendered opinions clearly beyond
18 the scope of his expertise, clearly inconsistent with what he
19 was advertised to be. And they were opinions, in large part,
20 which if offered, for example, at trial would be
21 inadmissible, because they comment on the ultimate fact in
22 this case. They would just be an instruction to the jury how
23 to determine the case, and, by extension, they would be
24 instructions to you, the trier of fact in this hearing, as
25 how to decide this case. This is all we've received from

1 Mr. Echols in this case.

2 Given that his report -- let me see if I
3 can structure this in a logical way. Given our position that
4 his report is in and of itself inadmissible as an expert
5 report, because it is not the kind of expert report that is
6 consistent with his qualifications and experience, and
7 therefore it is not admissible through him. By extension,
8 his testimony, if proffered today, consistent with that
9 report, would likewise inadmissible, because he would be
10 testifying consistent with this inadmissible report. And to
11 the extent that he would try to testify differently, to
12 expand upon these ideas, to offer new and independent
13 arguments, we believe they are clearly barred by this Court's
14 discovery cutoff order of October 2nd, not to mention this
15 Court's previous discovery cutoff of June 22nd, 2009.

16 In short, Mr. Echols, if he were here
17 only to testify about this report, should not be permitted to
18 testify, because these are not expert matters that meet any
19 part of the definition of Rule 702, as we've indicated to the
20 Court. If he tries to testify about something else, he
21 should be prohibited from testifying, because it was not
22 disclosed.

23 With regard to Dr. Keen, some of the same
24 problems exist. Dr. Keen provided autopsy report documents,
25 notes, and other information, last year in this case. There

1 has been nothing from Dr. Keen in writing for many, many,
2 many, many months in this case -- most of the time that this
3 case has been pending -- until we received in disclosure,
4 before October 2nd, this sort of strange, one-paragraph,
5 unsigned, undated document, at Bates 10599, without any
6 indication of who the author was, that relates a telephone
7 conversation between this unknown person and Dr. Keen. It
8 says, "On September 16, 2009, I was asked by Joe Butner to
9 contact Dr. Keen."

10 And it summarizes that telephone
11 conversation with Dr. Keen in which Dr. Keen, for the first
12 time, offers some new opinions regarding matters that could
13 be addressed today. There is an indication in this report
14 that the conversation was recorded, but the tape didn't work,
15 and therefore, Dr. Keen's portion of the recording was not
16 recorded.

17 We then got -- then we got, after
18 October 2nd, a supplemental narrative. It's the same
19 paragraph, but it has a header, now, indicating that the
20 author was Detective McDormett, and that it's dated 9/29/09
21 at 4:06 in the afternoon, and it's approved by
22 Detective Bolts {phonetic spelling} in the sheriff's
23 department on that same day at 4:31. So there is no new
24 information.

25 So here is our concern with Dr. Keen's

1 testimony. We have no new information directly from Dr. Keen
2 that was disclosed, but we have this -- the one side of this
3 telephone conversation between Detective McDormett and
4 Dr. Keen. Our concern is that Dr. Keen might take the stand
5 and might be asked to expand upon or explain or offer
6 additional information about these opinions.

7 We say that this report from Detective
8 McDormett does not constitute an appropriate disclosure of
9 new opinions from Dr. Keen, subject to cross-examination and
10 rebuttal in this proceeding. So we are going to ask you to
11 limit Dr. Keen's testimony to his work product and not permit
12 him to go into the matters raised in this new conversation.
13 The lack of due process and the inability of the defendant in
14 this case to adequately respond to this information in the
15 way in which it came is the problem we have here today.

16 So to recap with respect to Dr. Keen, we
17 are going to ask you, and do ask you, to enter an order
18 strictly limiting Dr. Keen to testifying about those matters
19 that he has previously authored reports about, but not permit
20 him to go into the matters contained in this police report
21 that talks about one side of the conversation between
22 Detective McDormett and Dr. Keen.

23 Finally, Mr. Butner indicates that
24 Detective Page from the Yavapai County Sheriff's Office would
25 be called as a witness. We have pulled from the disclosure

1 all of the reports that we have received from Detective Page.
2 There were no new reports received between the last time we
3 were in court on October 2nd, and we would ask that the Court
4 be observant of the possibility that Detective Page might
5 want to begin to testify about matters which have not
6 previously been disclosed.

7 The Court has already heard from
8 Detective Page about virtually all of the matters in his
9 reports in the Simpson hearing in December and January of
10 this year. His later authored reports deal largely with some
11 forensic work and the process of copying computer hard drives
12 and disclosing them to the defense in this case. But we
13 don't know whether Detective Page would be asked questions
14 about work that he has done recently, about which we know
15 nothing.

16 So those are our concerns, Judge, and we
17 don't make these objections lightly, but we are principally
18 concerned about Mr. Echols' and Dr. Keen's testimony and what
19 we think is the likelihood that they would be asked to
20 explain and expound and go in different directions from the
21 material they have.

22 We treat the Court's order as extremely
23 serious, that the State has had -- on October 2nd, they had
24 nearly a year from the time Mr. Democker was arrested to get
25 this information available. This is what they've produced.

1 I have pointed out what I think are the
2 significant defects regarding the admissibility of
3 Mr. Echols' report to begin with, and I ask that you enter an
4 order that his report not be admissible and that he not be
5 permitted to testify about those matters and, as a result,
6 that he not be permitted to testify at all in this
7 proceeding.

8 We ask that you enter an order limiting
9 the scope of Dr. Keen's testimony in evidence in this case to
10 those matters regarding reports authored by Dr. Keen and not
11 permit him to present new and different theories and opinions
12 beyond those which he has proffered or disclosed. Thank you.

13 THE COURT: The motion with regard to the
14 motion in limine on Dr. Keen is denied.

15 If you would respond to the other two,
16 Mr. Butner.

17 MR. BUTNER: Judge, what the State did was to
18 do our best to comply with the Court's order to get all of
19 the discovery concerning expert witnesses to the defense
20 prior to the cutoff date. What I hear now is that they just
21 don't like what we've we presented to them.

22 Mr. Echols has done his best to sort
23 through literally thousands and thousands of pages of
24 documents from the point of view of a forensic certified
25 public accountant and make conclusions from the point of view

1 of a forensic certified public accountant. We have provided
2 a document which represents his report after going through
3 all of that factual evidence, and it represents his
4 conclusions. They don't like it.

5 This is a probable cause hearing. The rules
6 of evidence are somewhat lax, as the Court is well aware, and
7 what we are attempting to do is to provide to the Court and
8 to the defense, through due process, the facts and evidence
9 that support the State's allegations of aggravators that
10 would necessitate the death penalty if a jury were to so
11 find.

12 They don't like what they see, but the
13 evidence that supports the conclusions, first of all of
14 Mr. Echols, is evidence that we worked diligently to provide
15 to them in a timely fashion. They don't like his expert
16 conclusions, but those are conclusions that we worked
17 diligently to provide them.

18 The argument that he doesn't like what
19 Mr. Echols has to say, I think, should not fly in this court.
20 It just doesn't have merit. His conclusions are those of a
21 certified public accountant and a specialized financial fraud
22 analyst, and I would ask that the Court deny the defense
23 motion in that regard.

24 And I would like to submit the report as
25 evidence in this particular case in conjunction with

1 Mr. Echols' testimony, which will demonstrate the factual
2 basis upon which it relies.

3 THE COURT: What about Deputy Page?

4 MR. BUTNER: Deputy Page, in a similar vein,
5 will -- when I met with Deputy Page, he doesn't have any new
6 reports. In fact, he has been going through all of this
7 computer stuff for months.

8 What he does have is somewhat refined
9 conclusions from -- and statements, based upon the facts that
10 he had presented to the Court in the Simpson hearing. He has
11 just gone back -- he wasn't in a position at that point in
12 time to be specific in terms of dates and so forth. He will
13 be in a position at this point in time to be a little bit
14 more specific about that kind of information. I wouldn't
15 anticipate that he has anything new.

16 The only thing that might be new that
17 would come up would be e-mails and things of that nature that
18 went back and forth between Mr. Democker and Carol Kennedy.
19 Those things were disclosed long, long ago in the computers
20 of the various parties, and the defense has had access to
21 that stuff for a long time. We will be presenting those with
22 more specificity in this hearing because of the nature of
23 this hearing, that being a hearing to provide
24 probable-cause-type evidence to support the aggravators in
25 the death penalty.

1 So Detective Page's testimony has
2 previously been disclosed and is based upon facts that have
3 previously been disclosed. It will, in essence, be a
4 refinement of his prior testimony and be more specific in
5 nature.

6 THE COURT: Before I leave you, are there any
7 of the factors that have been alleged that you are
8 withdrawing?

9 MR. BUTNER: No, your Honor. And in fact, at
10 this point in time, the one thing that I would say is I think
11 the Court has, in essence, made a previous finding about
12 there being in existence the presence of one factor, that
13 being the defendant has been or was previously convicted of a
14 serious offense, whether preparatory or completed, committed
15 on the same occasion as the homicide, or consolidate the
16 trial with the homicide.

17 And I would ask that the Court take
18 judicial notice of the grand jury finding of probable cause
19 to support the charge of a --

20 THE COURT: Armed burglary.

21 MR. BUTNER: -- armed burglary.

22 THE COURT: Mr. Sears.

23 MR. SEARS: Going back to Mr. Echols, Judge,
24 it is not simply a question that we don't like Mr. Echols'
25 findings in this case. But this is what he says at the end

1 of his four-page report: "We feel the facts presented show a
2 significant motive for Mr. Democker to want to prevent
3 Carol Kennedy from taking him back to court. His exposure to
4 conviction is great, and the resultant consequences are
5 disastrous."

6 Mr. Butner has confirmed what the State
7 has previously disclosed. Mr. Echols is not an expert on
8 motive. He is not an expert on licensing. He is a forensic
9 accountant. This is the problem.

10 This report is replete -- and we gave you
11 examples in our bench memo that we filed yesterday of the
12 conclusions that he has rendered. What is significantly
13 missing are any conclusions that you would expect an
14 accountant to draw -- any analysis of the three areas that he
15 says he examined in particular, which were: the book of
16 business that Mr. Casalena alleged had value, that was
17 acquired by Mr. Democker during the marriage; the filing of
18 the 2007 tax return; and the documents filed with the Court.

19 There is absolutely no reference to any
20 document, any finding, any Bates-number page, anything in
21 this four-page letter dealing with those issues. Instead, as
22 Mr. Casalena did, Mr. Echols repeats these allegations, that
23 these are disastrous, that these are telling, that these are
24 problematic. That's not expert testimony. That is something
25 that renders this report a non-expert document, thus

1 inadmissible under Rule 702.

2 The cases that we provided to the Court
3 in our bench memorandum indicate that the Rules of Evidence
4 may not necessarily be applied strictly in this case, but
5 because Rule 702 codifies due process with respect to expert
6 testimony, it's pretty clear from the case law and from
7 fundamental principles of due process that if a person
8 purports to testify in this proceeding, this Chronis hearing,
9 as an expert, what that person says must be subject to Rule
10 702, if it's going to be admissible.

11 And we have the benefit, such as it is,
12 of having his report here. And if you fold into that the
13 disclosure rules, which the Court has applied to this
14 proceeding, this is all we have from Mr. Echols, is this
15 report.

16 So for the reason -- the combined reason
17 of the applicability of 702 and your discovery cutoff, this
18 is what Mr. Echols would testify to. We suggest to the Court
19 strongly that it is not appropriate, it is not admissible.

20 So we would oppose, when the time comes,
21 any effort by the State to offer this report, for those
22 reasons. But I think it is really important now to
23 understand that Mr. Echols should only be allowed to testify
24 to those things which should have been disclosed. If what he
25 disclosed is inadmissible, then there is nothing left for him

1 to testify about.

2 I recognize that it's a burden on the
3 Court and on the State to have to do this, but it was not
4 until yesterday afternoon that Mr. Butner told me that
5 Mr. Echols was going to testify today in person, even though
6 I had asked him previously to tell me who his witnesses were
7 going to be.

8 So here we are. And how we would try to
9 defend against and rebut and cross-examine Mr. Echols or
10 Detective Page about matters we don't know anything about is
11 the problem that I am raising with the Court now.

12 And all we know about Mr. Echols' work is
13 what is contained in this report, and that is the report
14 about which we have great problems, so I think it is
15 altogether appropriate to exclude him.

16 THE COURT: As a preliminary matter, I am
17 going to deny the request to exclude him. I'll require that
18 you make your objections as the testimony comes in. And the
19 same with Detective Page, who has previously been disclosed
20 and whose reports I am told have already been disclosed.

21 MR. SEARS: Thank you.

22 THE COURT: You may call your first witness.

23 MR. BUTNER: I would like to call Dr. Keen to
24 the stand. Could I have just a moment to confer with him?
25 He was going through some photographs that I wanted him to

1 make selections from.

2 MR. SEARS: And your Honor, I would invoke the
3 rule excluding witnesses in this matter, at this time.

4 THE COURT: Do you have any witnesses you are
5 going to present, Mr. Sears?

6 MR. SEARS: No. Not that are in the courtroom
7 today. We may present witnesses, but they are not here
8 today.

9 THE COURT: Mr. Butner?

10 MR. BUTNER: Detective McDormett is my case
11 agent.

12 THE COURT: He is not barred by the rule.

13 MR. BUTNER: Right. And I think other
14 witnesses are already out in the hall, waiting. And I will
15 tell them about the rule being invoked.

16 Mr. Echols is in the back corner.

17 THE COURT: I presume you are familiar with
18 the rule excluding witnesses from your previous testimony?

19 MR. ECHOLS: Yes, sir.

20 THE COURT: I'll excuse you from the
21 courtroom, at this point, then, as well.

22 Mr. Butner, you are excused to consult
23 with Dr. Keen on the exhibits you intend to use.

24 MR. BUTNER: Thank you, Judge.

25 Judge, could we have a side bar on this

1 particular issue, I guess?

2 THE COURT: With the court reporter?

3 MR. SEARS: Yes.

4 (Whereupon, the following was held in chambers.)

5 THE COURT: The record shows we are outside
6 the presence of the jury and outside the presence of the
7 defendant --

8 MR. SEARS: We waive his appearance.

9 THE COURT: Thank you. -- With the lawyers.
10 And I think part of it was so that we are outside of the
11 presence of the gallery, also.

12 Mr. Butner.

13 MR. BUTNER: Judge, I asked Dr. Keen to go
14 through the photographs, the autopsy photographs, out in the
15 hallway there, and pick the ones that he felt were most
16 important for him to use in his testimony. And so I had
17 those here, and I wanted to show those to the Court and
18 Counsel. And Mr. Sears indicated to me that he is going to
19 object to all of them, which really comes as no surprise, but
20 here is the first one.

21 THE COURT: Okay.

22 MR. BUTNER: And here's the second one. Third
23 one. There's the fourth one. There's the fifth one.

24 MR. SEARS: Those are photographs from the
25 forensic anthropologist.

1 THE COURT: Fulginiti?

2 MR. SEARS: Correct.

3 MR. BUTNER: There's the sixth one. There's
4 the seventh one. There's the eighth one. There's the ninth
5 one. There's the tenth one. There's the eleventh one.
6 There's the twelfth one. There's the thirteenth one.
7 There's the fourteenth one. There's the fifteenth one.
8 There's the sixteenth one. There's the seventeenth one. And
9 it looks like there's -- kind of rushed by there. And
10 there's the eighteenth one.

11 MR. SEARS: I have a number of objections that
12 I'll make as -- let me tell you the concerns.

13 I think there is a lack of foundation for
14 all of Dr. Fulginiti's photographs, and there's a
15 confrontation Sixth Amendment Crawford issue, even at this
16 level, if Dr. Keen wants to testify from someone else's work
17 product where he wasn't present, didn't take the photographs,
18 can't lay the appropriate foundation for it.

19 There are photographs, in that group, of
20 the body nearly two weeks postmortem, where the sheriff's
21 department came back with a golf club and had the body taken
22 out of the drawer, out of the bag, and the golf club laid
23 against the wounds. There is a lack of foundation for those
24 photographs of the golf clubs. I have a -- I will need --

25 THE COURT: What is your foundational

1 objection, if you might give me a clue?

2 MR. SEARS: They just brought an object in --
3 they want -- the sheriff's office wants you to conclude --
4 and the State wants you to conclude that that weapon somehow
5 is involved with this homicide, and that is the reason that
6 these staged photographs were created there.

7 They haven't laid a foundation for why
8 they picked that object out of the universe of objects in the
9 world, except they would like it to be --

10 THE COURT: Why do they have to, for purposes
11 of this hearing?

12 MR. SEARS: Because they want you to find
13 substantial evidence that connects Mr. Democker to that golf
14 club, to the finding of probable cause for that aggravator,
15 which I suspect is going to be the F-6 aggravator -- that
16 would be my guess -- that Dr. Keen wants to offer opinions.

17 The real problem I have is going to be
18 the recurring problem, which is Dr. Keen thus far has not
19 advanced any opinions -- even with this late-disclosed
20 telephone call -- about which of these wounds were fatal,
21 which of these wounds would have rendered her unconscious,
22 the sequence of the wounds, the time period, of even whether
23 more than one object was involved in these wounds.

24 The State has a unified theory there was
25 a golf club that accounts for the linear wounds on the arms.

1 Dr. Keen wants to offer, I think, new
2 first-time, out-of-the box testimony today about the
3 defensive nature of these wounds. He was never asked or
4 never offered any opinions early on about which wounds were
5 defensive wounds and why they were defensive. And today he
6 wants to come in with no disclosure to us and say "This is
7 why I think these wounds are this."

8 And he also wants to offer he used -- I
9 will tell you this -- in this telephone conversation with
10 Detective McDormett, McDormett says that Dr. Keen says that
11 there are signs of torture in this case. That is a brand
12 new, first-time opinion for which there is no foundation.
13 Dr. Keen undoubtedly is going to be asked by Mr. Butner to
14 explain what he means.

15 Now all we have, thus far for disclosure,
16 is that statement in a McDormett report.

17 THE COURT: What makes you think Crawford is
18 applicable at this stage?

19 MR SEARS: I think you always have in any -- I
20 think the holding in Crawford is that when testimonial
21 evidence is presented in any proceeding in which ultimate
22 issues are at stake, that the Sixth Amendment confrontation
23 right applies and requires a witness -- a live witness who is
24 the person who has the evidence to prevent the hearsaying in
25 at all kinds of proceedings.

1 If this were a straight grand jury
2 proceeding under 12.9, there may be a difference. I don't
3 think it is.

4 I think Rule 5 applies --

5 THE COURT: Don't you think that that kind of
6 testimony is admissible in a Rule 5 hearing, a preliminary
7 hearing?

8 MR. SEARS: No. I think that the case law
9 that limits hearsay says certain kinds of reliable hearsay
10 would be admissible under Rule 5 in a preliminary-type
11 hearing which --

12 THE COURT: So Dr. Fulginiti working with
13 Dr. Keen for all these years doesn't come under that?

14 MR. SEARS: I wouldn't think so.

15 THE COURT: Why?

16 MR. SEARS: Because we don't have any -- and
17 we don't have anything in disclosure in Rule 15 that suggests
18 that Dr. Keen was in any way involved in directing or
19 analyzing or supporting work. Two separate concepts.

20 We have disclosure for Dr. Keen's work,
21 and then an independent decision made to take the head down
22 to Tucson and let Dr. Fulginiti work on it, and no indication
23 that either of them communicated with the other.

24 It may be that that turns out to be the
25 case, but based on what we've been given, we don't know that.

1 THE COURT: What other issues do you have with
2 regard to this?

3 MR. SEARS: The sensitivity of the family, and
4 if Dr. Keen is going to be allowed to testify graphically
5 about what's depicted in these, even though the Court has
6 indicated that only the witness and the Court and the lawyers
7 would see these, I would like an opportunity to talk to the
8 family about the nature of this testimony. The testimony
9 itself would be disturbing -- not as disturbing as the
10 photographs, but I'd like to give them the opportunity to
11 leave, if they need to.

12 THE COURT: Well, do that.

13 I am going to deny your motion for
14 exclusion or foundational objections at this point. I
15 haven't heard --

16 MR. SEARS: I expect to make those objections
17 as the photos come up, if they are different from the
18 objection that you just overruled.

19 THE COURT: Better consult with your family.

20 MR. SEARS: If I could have a few minutes.

21 MR. BUTNER: That will give me an opportunity
22 to give these photographs to the clerk and have them marked.
23 Thanks, Judge. We can go out the other way.

24 MR. SEARS: While we are still on the record?

25 THE COURT: We are.

1 MR. SEARS: Is it the Court's ruling that the
2 confrontation clause doesn't apply to this hearing?

3 THE COURT: I am not -- Mr. Sears, you are not
4 going to lay that on me.

5 MR. SEARS: Well, at some point, we need to
6 make that record, Judge.

7 THE COURT: It's my ruling that the Court will
8 listen to the evidence to see if an appropriate foundation is
9 laid for the testimony that I am going to receive.

10 MR. SEARS: Understand, your Honor, that we
11 intend to make the objection based largely on Crawford and
12 the Sixth Amendment confrontation right. We will make that
13 objection on the record.

14 THE COURT: Then I will rule on it depending
15 on what's in front of me at the time.

16 MR. SEARS: Thank you.

17 (Whereupon, the following was held in open court.)

18 THE COURT: I think the other witnesses have
19 left the room.

20 So resuming in the Democker matter, we're
21 about 45 minutes into it, without having started a witness
22 yet, and the hearing was scheduled to go until noon today. I
23 consult -- just so other interested parties know, I consulted
24 with the lawyers. And from today I am going to reset the
25 matter -- on the fair assumption that the hearing is not

1 going to be concluded by noon -- I am going to reset the
2 matter to next Wednesday, a week from this coming Wednesday,
3 which will be the 28th at ten o'clock.

4 MR. SEARS: Do we have the day, your Honor?

5 THE COURT: We have the remainder of the day
6 after ten o'clock on the 28th.

7 If the clerk would swear in Dr. Keen.

8 THE CLERK: Do you solemnly swear upon penalty
9 of perjury that the testimony you are about to give will be
10 the truth, the whole truth, and nothing but the truth, so
11 help you God?

12 THE WITNESS: Yes, ma'am.

13 MR. BUTNER: Thank you, Judge.

14 PHILLIP KEEN, MD.,
15 called as a witness, having been duly sworn, testified as
16 follows:

17 DIRECT EXAMINATION

18 BY MR. BUTNER:

19 Q. Please state your name for the record.

20 A. Phillip Keen, MD.

21 Q. And what is your occupation, Dr. Keen?

22 A. I am a forensic pathologist.

23 Q. How long have you been a forensic pathologist?

24 A. Technically, I guess since the time of board
25 certification, which would be November of 1975.

1 Q. And would you describe for us your education --
2 professional education in summary to prepare yourself for
3 that occupation?

4 A. I have an MD degree from the University of New
5 Mexico, 1969, followed by a residency in anatomic and
6 clinical pathology at the University of New Mexico through
7 1969 through 1973. Fellowship in forensic pathology at the
8 office of the chief medical examiner for State of Oklahoma
9 1973/1974, and board certified by the American Board of
10 Pathology in anatomic, forensic, and clinical pathology in
11 November of 1975.

12 Q. Okay. And on or about July 2nd of 2008, what job
13 were you performing at that point in time?

14 A. I was the chief medical examiner for Yavapai
15 County.

16 Q. And how long have you been the chief medical
17 examiner for Yavapai County up to that point, approximately?

18 A. I was the chief medical examiner at Yavapai County
19 from September 12, 1975, until June 22nd, 1992, and chief
20 from July 1997 until this year, June 30th.

21 Q. June 30th of 2009?

22 A. Yes, sir. The period of time in between, I was
23 the chief medical examiner for Maricopa County, June 22nd,
24 1992, until September of 2006.

25 Q. And have you testified as an expert in the

1 Superior Court of the State of Arizona?

2 A. Several counties, yes, sir.

3 Q. On how many occasions have you been qualified as
4 an expert witness to testify in the Superior Court of the
5 State of Arizona?

6 A. I don't know. It's in the hundreds.

7 Q. And basically, what is the field of expertise that
8 you have been qualified to testify as an expert?

9 A. As a pathologist, and particularly and
10 specifically most times as a forensic pathologist.

11 Q. And as a medical examiner?

12 A. And as a medical examiner as appropriate.

13 Q. Okay. And have you testified as an expert
14 concerning autopsies that you have performed?

15 A. Those that I have performed and those that others
16 have performed.

17 Q. And have you testified as an expert concerning the
18 cause and manner of death?

19 A. Yes, sir.

20 Q. Now, proceeding with the case before the Court.
21 On or about July the 8th -- or July the 2nd of the year 2008,
22 did you have occasion to perform an autopsy on a person you
23 came to know the identity as being Virginia Carol Kennedy?

24 A. Actually, July 3rd. And the answer is yes.

25 Q. And did you prepare a report in connection with

1 that?

2 A. I did.

3 Q. Okay. And in addition to performing that autopsy
4 on Virginia Carol Kennedy, did you also submit blood samples
5 or tissue samples for further analysis?

6 A. Yes, sir.

7 Q. Would you describe what you did in that regard.

8 A. The clothing that was on the decedent was
9 collected -- and I don't have a copy of my report to know
10 what all the other evidentiary items were -- but I collected
11 a sample of blood for toxicology and for possible blood
12 comparison testing.

13 And also in conjunction with this, ultimately,
14 also submitted the skull for evaluation by the forensic
15 anthropologist Dr. Fulginiti.

16 Q. And is that Dr. Laura Fulginiti?

17 A. Yes, sir.

18 Q. Did you receive a report back from Dr. Fulginiti
19 in connection with her examination and analysis?

20 A. Yes, sir.

21 Q. And did you also receive a toxicology report back
22 in connection with the blood samples that you had submitted?

23 A. Yes, sir. In addition to the evidentiary-type
24 blood specimens, I took one for toxicology testing, which we
25 submit to our reference laboratory, which is AIT in

1 Indianapolis, and I received a report back on that.

2 Q. And did you gather all of that information as part
3 of your analysis and report concerning this case?

4 A. Yes, sir. Dr. Fulginiti's report stands
5 independent, but otherwise, yes.

6 Q. And have you relied upon Dr. Fulginiti's report in
7 the opinions that you have formed in this case?

8 A. Not really. They are confirmatory in some
9 aspects, and I relied upon on her reconstruction of the
10 skull, since I didn't reconstruct the skull, to further
11 delineate the fractures that I had already observed.

12 Q. Okay.

13 THE COURT: I will note that with the new
14 computer system also came new evidence tags.

15 MR. BUTNER: It is so small, it is hard for me
16 to read, Judge, quite frankly.

17 THE COURT: I join you in that, Mr. Butner.

18 MR. BUTNER: Progress.

19 MR. SEARS: Your Honor, to the extent that the
20 State is proposing this unmarked -- I'm sorry.

21 MR. BUTNER: No, it is marked, Mr. Sears.

22 MR. SEARS: Do we have an exhibit number? Is
23 it 19?

24 MR. BUTNER: It was just pointed out to me.
25 It's that very small number right there on the end.

1 MR. SEARS: Exhibit 19. Exhibit 19, your
2 Honor, contains the last two pages -- Bates 548 and 549 are a
3 letter purportedly authored by Dr. Fulginiti to Lieutenant
4 Rhodes of the sheriff's office.

5 I would object on foundation,
6 confrontation, Sixth Amendment grounds, to the inclusion of
7 Dr. Fulginiti's letter in Dr. Keen's report. He clearly is
8 not the author, and he's testified that he didn't rely
9 directly on this. It was simply confirmatory.

10 So to the extent that I have an
11 objection, my objection is to those two pages -- the last two
12 pages of proposed Exhibit 19. And that's my bases, the Sixth
13 Amendment confrontation issue.

14 THE COURT: Mr. Butner.

15 MR. BUTNER: Judge, the doctor did indicate
16 that he relied upon Dr. Fulginiti's analysis and report
17 concerning the reconstruction of the skull in his analysis
18 and autopsy report in its complete form.

19 And I believe, if I need to lay a little
20 further foundation, I can do that. I think that this is the
21 kind of thing that is reasonably relied upon in his field of
22 expertise.

23 THE COURT: He hasn't told me that, but if you
24 would develop that further, then I will reserve the ruling.

25 MR. BUTNER: Okay.

1 MR. SEARS: I'm sorry, your Honor. I have
2 further -- now that I am reading this for the first time, I
3 have a further objection.

4 THE COURT: Why are you reading it for the
5 first time?

6 MR. SEARS: This exhibit. I read this report.
7 This report is now 15 months old.

8 THE COURT: Oh. It thought it was some other
9 aspect of --

10 MR. SEARS: Oh, no. It's something I have
11 seen before.

12 But there is -- in regard to this witness
13 and this exhibit, there is a further statement of
14 Dr. Fulginiti about an event that took place on July 28 where
15 sheriff's detectives came down with a golf club and asked
16 Dr. Fulginiti to make some conclusions about this particular
17 golf club. And I particularly object on confrontation,
18 hearsay, Sixth Amendment confrontation --

19 THE COURT: I think I heard that evidence in
20 another hearing, in the Simpson hearing, didn't I? Or
21 references to the same?

22 MR. BUTNER: You did, Judge.

23 MR. SEARS: Part of it. Part of it.

24 What you heard, I believe, in the first
25 one -- and I've got the transcript of the Simpson hearing

1 here -- there were two different opinions rendered by
2 Dr. Fulginiti. One of them was early on, was one that was
3 coupled with the suggestion that the sheriff's office test
4 other objects.

5 And then there were attempts by the
6 sheriff's office to go down and get her to say something
7 different and more helpful to them. And I believe that
8 that's -- this is the first such conversation, says it cannot
9 be ruled out, and then they went back later and asked her
10 more questions about the same object.

11 I have to look and see, but my objection
12 remains the same, which is Dr. Fulginiti's report doesn't
13 belong in this exhibit.

14 THE COURT: I thought you advised me that the
15 parties were not going to go back over, that you would allow
16 me to consider what had already been testified to in prior
17 hearings.

18 MR. SEARS: That's true, and I think that
19 seems self-evident.

20 But what I am saying is this is an
21 exhibit offered through this witness, which has those same
22 problems. And Dr. Fulginiti -- I don't remember that letter
23 being offered and admitted at the Simpson hearing. I could
24 stand corrected on that.

25 Dr. Fulginiti, of course, did not testify

1 in person at the Simpson hearing, either.

2 THE COURT: I agree with that observation.

3 I will admit all but the pages by
4 Dr. Fulginiti on Exhibit 19. If you can re-mark that.

5 I can disregard the pages. I will
6 indicate for the record that I will not review those pages,
7 and will disregard them. You can just leave it as marked.

8 MR. BUTNER: Thanks, Judge.

9 THE COURT: If you would take a pen and just
10 line through, X-out those pages, so that the record is clear
11 on what is admitted and what isn't admitted.

12 MR. BUTNER: If I just put a blue "X" down at
13 the bottom corner here, would that be sufficient?

14 THE COURT: That would be fine, and the clerk
15 will re-mark it at an appropriate time.

16 MR. SEARS: We now see yet another problem
17 with these new stickers. If you put them on the wrong page,
18 you have got to live with it.

19 BY MR. BUTNER:

20 Q. Let me show you what has been marked as Exhibit
21 No. 19.

22 Excluding the last two pages of that
23 exhibit, Dr. Keen, do you recognize that?

24 A. I do. This is -- with the exclusion of those two
25 pages, this is the report that I authored or relied upon in

1 terms of the receipt of the specific toxicology report from
2 AIT.

3 Q. And is it, in essence, your complete autopsy
4 report concerning Virginia Carol Kennedy?

5 A. Yes, sir.

6 Q. And that includes toxicology and whatever other
7 outsourced analysis you had performed; is that correct?

8 A. Yes, sir.

9 Q. Was there any other analysis that you sent out
10 besides the stuff that you sent for toxicology analysis and
11 the stuff you sent to Dr. Fulginiti for her analysis?

12 A. No, sir.

13 Q. Okay. And I think the Court already indicated
14 that now that is admitted.

15 MR. BUTNER: Is that correct, Judge?

16 THE COURT: Yes.

17 MR. BUTNER: Thank you.

18 Q. Okay. Tell me, Dr. Keen, what you did to perform
19 your autopsy on the body of Virginia Carol Kennedy.

20 A. Did an examination, as would normally be done in
21 an autopsy. First, removing any items of apparel, checking
22 for any trace evidence that might be directly observable with
23 the naked eye, that might be possibly related to another
24 party around the death. Remove the clothing. Examine the
25 external body for evidence of injury and illness, and then

1 proceeded to examine the body internally for evidence of
2 injury and illness, with taking time to do some diagrams of
3 my own, and then also having photographic documentation in
4 photographs.

5 I took some photographs, which were part
6 of the file -- and not in this particular folder, at the
7 moment. And then there were other photos that were taken by
8 members of the sheriff's department, who were in attendance
9 at the autopsy.

10 Q. Okay. Let's talk about the external analysis,
11 first of all. Tell us what you noted of significance in your
12 external analysis of the body of the victim.

13 A. She had multiple blunt-force injuries -- blunt
14 force, including lacerations, abrasions, fractures, some
15 contusions. Most of these concentrated around the head and
16 neck area, but some additional injuries, which very early on
17 caught my attention. Two patterned contusions of her right
18 forearm and right arm bridging cross the elbow joint.

19 Q. Okay.

20 MR. SEARS: Excuse me. Could we get Dr. Keen
21 maybe to sit back a bit from the microphone. It's tending to
22 give a little feedback.

23 THE WITNESS: Tell you what. Why don't I sit
24 back and kind of ignore the factors and speak up. It's a lot
25 easier for me.

1 MR. SEARS: That's always a good idea.

2 THE COURT: That will work.

3 MR. BUTNER: All right.

4 Q. Well, let's talk about -- I guess, would it be
5 best to go from bottom to top or top to bottom?

6 Or what order -- let me just put it this
7 way, then: What order did you conduct this external
8 examination?

9 A. I conducted the exam in a way in which I could see
10 the most without -- doing the least intervention to the body.
11 So I looked at the extremities, I looked at the torso, and I
12 looked at the head and neck last.

13 Q. Okay. Describe for us with specificity, if you
14 will, proceeding in that fashion, the areas and items of
15 significance that you noted.

16 A. There were some non-patterned abrasions on the
17 back of the torso -- more to the right side.

18 There were these two patterned contusions
19 of the right arm and forearm, one of which very early on
20 caught my attention, which I said this -- first of all, it's
21 characteristic of a rod-type injury. It's a blanched area
22 with parallel areas of hemorrhage on either side and
23 contusion, but there was also a pattern on the triceps area,
24 which is above the elbow on the right arm, which to my first
25 impression resembled a golf club.

1 Q. You mean on the date of July the 3rd of 2008, when
2 you first observed the body of Virginia Carol Kennedy, in
3 looking at her triceps area on her -- I guess it was her
4 right arm -- you noted what in regard to what appeared to be
5 a golf club?

6 A. Well, there are two injuries that are consistent
7 with the shaft of a golf club. They're rod-type injuries.

8 But on the area of the triceps area, it
9 was expanded bruising, and it was about the dimension of and
10 shape of a golf club.

11 Q. We have a number of pictures here, Exhibit 1
12 through 18, and I am just going to give all of these exhibits
13 to you and ask that you refer to them. If you'll see -- I'm
14 going to show you the back, first of all -- that little
15 number there is the exhibit number, okay? Apparently, you
16 can see it better than I can.

17 If you would go to the one, first of all,
18 that you are talking about in regard to the rod-type
19 injuries, if you will.

20 A. There are two exhibits. One is Exhibit No. 15,
21 which --

22 Q. Okay. Before you talk about it, that is
23 Exhibit 15 that you are referring to right now; is that
24 correct?

25 A. It is.

1 Q. Did you take that picture?

2 A. I did not.

3 Q. Who did?

4 A. I don't remember who was from the sheriff's office
5 that was actually manning the photography at the time.

6 Q. Do you recognize that particular photograph?

7 A. I do.

8 Q. And what is it a photograph of?

9 A. This is the photograph of the -- at the time of
10 autopsy, of the right arm and torso of the decedent.

11 And in the photo is a yellow rod --
12 essentially, it's a bow and arrow, archery-type rod -- which
13 I had placed over one of the patterns to show the rod-like
14 similarity. And you can see below that the other rod-like
15 injury.

16 Q. And so this is a photograph that was taken of the
17 body of Virginia Carol Kennedy, and you were present at the
18 time?

19 A. Yes, sir.

20 MR. BUTNER: I'd move for the admission of
21 exhibit number -- what number is it?

22 THE WITNESS: 15.

23 MR. BUTNER: 15.

24 MR. SEARS: No objection.

25 THE COURT: 15 is admitted.

1 BY MR. BUTNER:

2 Q. And then the other one that you had there before
3 you, were you present at the time that photograph was taken,
4 too?

5 A. Yes.

6 Q. And what exhibit number is that?

7 A. This is Exhibit No. 18.

8 Q. And what is a picture of?

9 A. It is a photo, again, of the right arm. And
10 depicted in this photo is the rod injury, which is obscured
11 by the presence of the arrow in Exhibit 15. This shows what
12 was under that arrow. And also has an ABFO ruler in the area
13 of the contusion or bruising that I thought looked like the
14 head of a golf club.

15 MR. BUTNER: I'd move for the admission of
16 Exhibit 18, also.

17 MR. SEARS: May I look at 18 for a moment,
18 your Honor?

19 THE COURT: You may approach.

20 MR. SEARS: May I have a question or two on
21 voir dire, your Honor?

22 THE COURT: You may.

23 VOIR DIRE EXAMINATION

24 BY MR. SEARS:

25 Q. Dr. Keen, if you could show me on proposed

1 Exhibit 18 the area that you described as an oval like
2 contusion.

3 A. Yes. And unfortunately, the photo doesn't
4 depict it to its full clarity, but this is the area. And we
5 have bruising going towards the ruler and we have two lines
6 coming -- where it's slightly red and slightly blanched in
7 between, this is the area.

8 Q. Okay. And you are pointing to an area inside the
9 scale, which I think is an odontology scale, if I'm not
10 mistaken.

11 A. We call it an "ABFO ruler." It's the American
12 Board of Forensic Odontology.

13 Q. Right. For teeth and jaws; correct?

14 A. Well, we use it for all sorts -- primarily for
15 that, but it's to try to be able to reproduce one-to-one
16 size.

17 Q. Okay. But just for purposes of understanding
18 Exhibit 18 for identification here, it is the area below and
19 to the right of this right-angle scale that's in this
20 picture?

21 A. But why don't we just say it's the area that's
22 encompassed within the square area of the scale.

23 MR. SEARS: Thank you.

24 No objection.

25 THE COURT: 18 is admitted.

1 DIRECT EXAMINATION RESUMED

2 BY MR. BUTNER:

3 Q. Doctor, can you tell us what is significant --
4 again, if you would -- concerning Photograph 15? What is the
5 significance of Photograph 15?

6 A. 15 is a photograph intended to illustrate the
7 approximate dimensions of the structure which produced the
8 rod-type contusion injuries, of which there are two.

9 Q. Would you show that to the Court, please.

10 A. One is beneath this, and this is the other.

11 Q. And then what's depicted in 18?

12 A. Show it to the judge, as well?

13 Q. Yes, but speak up, Doctor. Don't just speak to
14 the judge, because we need to hear you, too.

15 A. Okay. I will show to the judge what's in 18, as
16 well.

17 18 is the photo which has the rod-like
18 area, which was under the arrow before, which is now
19 exposed without the arrow, has an ABFO ruler with the area
20 of contusion in the area of the ruler, which corresponded
21 to whatever was at the end of the rod-like object.

22 Q. Now, you also began your description of external
23 injuries with a non-pattern abrasion on the back, as I
24 understood your testimony?

25 A. Yes, sir.

1 Q. Do you have photographs there of that particular
2 injury that you were speaking of?

3 A. I did not pull one of those. There are photos of
4 it. I don't happen to have them there.

5 I have two other photos which do show
6 other depictions of the rod-like injuries, but they do not
7 add more, they just show the other -- the pattern of another
8 rod for the other injury, and that is Exhibit No. 4 and
9 Exhibit No. 5.

10 Q. Okay. Were you present when those photographs
11 were taken?

12 A. Yes.

13 Q. And they are photographs of the victim's body --
14 Virginia Carol Kennedy's body?

15 A. Yes.

16 Q. And they were taken at the time of the autopsy?

17 A. Yes, sir.

18 MR. BUTNER: I would move for the admission of
19 4 and 5.

20 MR. SEARS: May I approach and look at 4 and
21 5, your Honor?

22 THE COURT: You may.

23 MR. SEARS: No objection to 4 and 5, your
24 Honor.

25 THE COURT: 4 and 5 are admitted.

1 BY MR. BUTNER:

2 Q. Okay. Those are more pictures of the rod-like
3 injuries?

4 A. Yes, sir, they are. They show sequentially one
5 exposed and the other covered by a rod, and then the other
6 exposed and the other covered by a rod, just to show the
7 similarity of the injuries.

8 Q. Please show those to the Court.

9 Okay. Now what other external injuries
10 did you note?

11 A. Other external injuries are the injuries primary
12 to the head and neck area. And we have, as I mentioned
13 earlier, both lacerations and contusions. With these include
14 facial damage, nasal damage. We have bruises to the lips.
15 We have fractures of the nose. And then we have some obvious
16 breaches in facial skin and scalp.

17 Q. And do you have photographs of those injuries
18 present?

19 A. There were photos that were taken. I have seen
20 the photos, but they are not selected as potential exhibits
21 here.

22 Q. You are the person that selected those exhibits,
23 aren't you, Dr. Keen?

24 A. Well, I am. We could put all of them in, if we
25 wanted, but I wanted to be somewhat selective.

1 The emphasis of these photos that were
2 selected to be possible exhibits are to the larger
3 blunt-force injuries and their consequences, in terms of the
4 multiple skull fractures and the lacerations of the overlying
5 skin. I was not wanting to demonstrate, particularly, the
6 broken nose or the bruised lips or the periorbital images.

7 Q. So the victim in this case, her nose was broken?

8 A. Her nose was broken.

9 Q. Okay. And was that on or about the time of her
10 death?

11 A. Apparently so, because there was bleeding
12 associated with it, and -- it's part of the facial fracture.
13 She has a whole complex of fractures which, essentially, is
14 removing the facial portions off of the base of the front of
15 the skull.

16 Q. What does that mean in layman's terms, so to
17 speak, what you just said, if I understand your testimony
18 correctly?

19 A. A blunt-force impact to the face which has some
20 motion to it, either up or to the side, not just straight on,
21 but if you have a motion which moves it up or moves it to the
22 side, can dislodge some of the facial bones off of the base
23 of the skull, and so they become comminuted.

24 And most of these are concentrated, in this
25 particular case, in the ethmoid plate, which is that area

1 behind the nose that goes up to the base of the skull.

2 Q. And so she was struck in the face?

3 A. She was struck in the face, yes.

4 Q. How many times? Could you tell?

5 A. At least once in the frontal area of the face,
6 because we have the associated bruising of the lip, as well
7 as the fractures of the nose.

8 Q. And did that cause distortion to her facial
9 features?

10 A. It does.

11 Q. Did it in this case?

12 A. Yes. There are some swelling associated with it,
13 as well as --

14 Q. So her nose was broken?

15 A. It is technically broken, yes, sir.

16 Q. At the bridge of her nose, if I understood your
17 testimony?

18 A. Well, pretty much at the bridge, yes.

19 Q. Okay. And then also she was struck in the mouth
20 in some fashion?

21 A. Yes, sir.

22 Q. And what were the injuries to her mouth area?

23 A. Bruising of the lip where there has impact against
24 the teeth.

25 Q. And that was photographed, also?

1 A. Yes.

2 Q. Let me show you what has been marked as
3 Exhibit No. 21.

4 MR. BUTNER: Judge, is it okay if I walk back
5 and forth approaching this witness?

6 THE COURT: Yes.

7 MR. BUTNER: Thank you.

8 Q. Are those the back injuries that you were speaking
9 of?

10 A. Yes, sir.

11 Q. Okay. And that photograph was taken at the time
12 of the autopsy?

13 A. Yes, sir.

14 MR. BUTNER: I'd move for the admission of 21.

15 MR. SEARS: Relevance?

16 THE COURT: 21 is admitted.

17 MR. BUTNER: Thank you.

18 Q. What injuries specifically are you talking about
19 in regard to that particular photograph?

20 A. Over the back, pretty much over the shoulder, but
21 continuing down over to the shoulder blade area of the right
22 shoulder are there some superficial scratch marks of
23 abrasion.

24 Q. And do you understand how those kinds of injuries
25 are usually caused?

1 A. Friction against another surface.

2 Q. Are they dragging-type injuries?

3 MR. SEARS: Leading.

4 THE COURT: Sustained.

5 BY MR. BUTNER:

6 Q. Are you aware of the mechanism that causes those
7 kinds of injuries, typically?

8 A. Yes, sir.

9 Q. What would that be?

10 A. Well, any kind of gliding, friction against a
11 surface.

12 Q. Okay. What are you talking about in terms of
13 somebody with gliding friction?

14 A. In the context of the scene of this particular --
15 if I may go there, as well -- the body was found next to a
16 desk. And this is the kind of injury that you could get from
17 coming in contact with either the desk or the floor, until
18 you come to the final resting place.

19 Q. So you are sliding along some sort of surface that
20 causes the injury?

21 A. Yes, sir.

22 Q. Okay. And you say those were superficial type of
23 injuries; is that correct?

24 A. Yes, sir.

25 Q. Are those the kinds of -- can you tell from

1 looking at those injuries in your examination whether those
2 were sustained either prior to the person's death or after
3 the person's death?

4 A. I would have to say perimortem, around the time of
5 death. They are the kinds of injuries that can occur
6 promptly after death if a body is moved, and you can't really
7 distinguish that.

8 Q. And Exhibit No. 22, do you recognize that
9 photograph?

10 A. Close-up photo of the same area, which the
11 previous exhibit demonstrated.

12 Q. Just a little bit better photograph; is that
13 correct?

14 A. Better detail, and a little more in focus.

15 Q. Okay. Let me show you what's been --

16 MR. BUTNER: I'd move for the admission of
17 Exhibit No. 22.

18 MR. SEARS: Your Honor, I have a question or
19 two on voir dire on, I think it's 21, in Dr. Keen's hand; is
20 that right?

21 THE COURT: 22.

22 MR. SEARS: 22. May I have a few questions?

23 THE COURT: Yes.

24 MR. SEARS: Thank you.

25

VOIR DIRE EXAMINATION

BY MR. SEARS:

Q. Dr. Keen, a moment ago, I thought I heard you say that you had some information that the victim's body was found near a desk; is that right?

A. Yes, sir.

Q. Did you visit the scene of this crime?

A. I did not visit the scene of the crime. I was supplied photos by the sheriff's office at the time I was doing my exam, to show me what the scene was that they had documented photographically. But that's the only awareness I have of the scene.

Q. Is there a reason why in Exhibit 19, your autopsy report, you make absolutely no reference to having been shown scene photos or any description of the scene?

A. No particular reason.

Q. What else were you told by the police or shown by the police, in connection with these events, that you didn't put in your report?

A. I was told some of what they had seen about the scene. Pretty much the discussion with the law enforcement was what they saw at the scene.

There were other conversations which occurred later in terms of what they were doing in the investigation, but that didn't affect what I was doing.

1 Q. Did you retain the photographs that you were
2 shown?

3 A. No.

4 Q. Why not?

5 A. Because they were still on the media of the camera
6 that had taken them.

7 Q. Did you ask for copies to include in your report?

8 A. No, because not my -- not my photos.

9 MR. SEARS: Thank you, your Honor. No
10 objection.

11 THE COURT: 22 is admitted.

12 MR. BUTNER: Thank you.

13 DIRECT EXAMINATION RESUMED

14 BY MR. BUTNER:

15 Q. Let me show you what's been marked as Exhibit
16 No. 23.

17 Do you recognize that particular
18 photograph?

19 A. Yes. This is a photo taken at the time of the
20 autopsy for identification purposes, including the case
21 number, the date of the exam. And it's a facial shot showing
22 injuries to the face and head.

23 MR. BUTNER: And I would move for the
24 admission of Exhibit 23 at this time.

25 MR. SEARS: No objection.

1 THE COURT: 23 is admitted.

2 BY MR. BUTNER:

3 Q. And what specific injuries are depicted in 23?

4 A. Of the ones we described so far, we have the
5 bruising to the lip, and we have some evidence of trauma to
6 the nose.

7 We also have, depicted in this photo,
8 some abrasion of the lower right chin; bilateral periorbital
9 hemorrhages -- black eyes; a patterned laceration of the left
10 forehead.

11 And you can see in the photo the degree
12 of distortion of the bony structures of the head, because it
13 is not a smooth contour. You actually see bones of the right
14 side of the head beginning to protrude the scalp outward, as
15 my hand is actually in back of the photo, holding the head up
16 to try to keep it as -- as shaped as much as I could.

17 Q. You say a "patterned laceration of the left
18 forehead."

19 A. Yes, sir.

20 Q. What does that mean? Would you explain that for
21 us, please.

22 A. Lacerations are breaches or tears in skin. And
23 the tensile strength of the skin gets exceeded by either
24 whatever impacts it or whatever is beneath it, in the case of
25 bone.

1 Most of the time, you don't have much of
2 a pattern to them. You have bridging fibers. You have
3 abrasions along the sides. But it's a just a tear, it could
4 be somewhat irregular.

5 This has an area that has a sharp edge to
6 it -- two right angles, and then it begins to converge down.
7 So there is a pattern to it, as if it struck something or
8 something struck it.

9 Q. Do you have an opinion as to what type of
10 something that would be that struck it?

11 MR. SEARS: Foundation.

12 THE COURT: Overruled.

13 THE WITNESS: There are a variety of things
14 which could do it. You just have to have something of the
15 proper dimensions and shape.

16 MR. SEARS: Your Honor, I object to this line
17 of questioning, as I see where it is going, for the reasons
18 that I expressed previously on the record today.

19 These are new, first-time opinions from
20 Dr. Keen. His opinions are contained in Exhibit 19. Any
21 other additional opinion about objects or injuries not
22 contained in that report violates this Court's prior order
23 regarding disclosure, due process, and our Sixth Amendment
24 rights in this case, and I would object on that basis.

25 THE COURT: Overruled.

1 BY MR. BUTNER:

2 Q. What sorts of things do cause this type of
3 patterned injury?

4 A. Almost anything that is firm and is of those kinds
5 of dimensions. I am not going to postulate any one
6 particular thing.

7 I could tell you consistency with
8 something that's postulated, perhaps, but there is such a
9 wide variety of things that could produce that, just so long
10 as at they have the right kind of dimensions.

11 Q. Well, can you give me an example of some of the
12 types of things that you have seen in the past that have
13 produced that type of injury?

14 A. In household settings, impacts with furniture can
15 do that.

16 In automobile situations, you can impact
17 with portions of motor vehicles that can do it.

18 In industrial settings, that could be
19 tools that could do it.

20 Q. Okay. In household settings you indicated impacts
21 with furniture. I'm assuming you're not talking about
22 somebody bumping their head on a soft type of surface, like a
23 couch surface.

24 A. No, this is a hard surface.

25 Q. Are you talking about somebody bumping their head

1 on some type of hard surface that has a corner to it?

2 A. A corner would do it.

3 Q. You indicated that you did observe photographs of
4 the scene?

5 A. Yes, sir.

6 Q. Did you see anything in the photographs of the
7 scene that you observed that seemed to be consistent with
8 this type of injury?

9 A. I don't know that I can say that I did or not,
10 because I didn't really look at the photographs of the scene
11 with that in mind.

12 MR. SEARS: Can we have some foundation as to
13 which of the enumerated injuries Dr. Keen is testifying
14 about?

15 MR. BUTNER: We're still talking about,
16 Mr. Sears, that patterned injury on the left forehead.

17 MR. SEARS: If I could have a moment.

18 MR. BUTNER: May I proceed, your Honor?

19 THE COURT: Yes.

20 MR. BUTNER: Thank you.

21 Q. When you observed the photographs --

22 MR. SEARS: Your Honor, I am still looking
23 for, in Exhibit 19, where Dr. Keen -- I still have an
24 objection.

25 THE COURT: State the objection, Mr. Sears.

1 MR. SEARS: The objection is without an
2 opportunity to be pointed to where in Dr. Keen's report he
3 describes this patterned laceration on the forehead --

4 THE COURT: State the objection without the
5 rest of it.

6 MR. SEARS: That's the objection. It's
7 undisclosed information. It's a new opinion.

8 THE COURT: Overruled.

9 BY MR. BUTNER:

10 Q. Dr. Keen, the victim's body was found in
11 relatively close proximity to a desk with a corner point on
12 the table-top portion of the desk, so to speak.

13 Is that the type of object or surface, if
14 you will, that could cause that type of injury that you
15 described as a patterned laceration to the left forehead?

16 A. It's possible. Yes, sir.

17 Q. Let me show you what has been marked as
18 Exhibit No. 25.

19 First of all, do you recognize that
20 photograph?

21 A. Yes, sir.

22 Q. Was that a photograph that was taken at the
23 autopsy?

24 A. Yes, sir.

25 Q. You were present when it was taken?

1 A. Yes, sir.

2 Q. In fact, is that your hand holding that ruler in
3 the photograph?

4 A. It is.

5 MR. BUTNER: I'd move for the admission of
6 Exhibit 25.

7 MR. SEARS: May I have a question or two on
8 voir dire, your Honor?

9 THE COURT: You may.

10 VOIR DIRE EXAMINATION

11 BY MR. SEARS:

12 Q. Dr. Keen, proposed Exhibit 25 has what I believe
13 your report describes as a linear abrasion on Miss Kennedy's
14 left thigh; is that right?

15 A. Yes, sir.

16 Q. Okay. Did you have an opportunity at the autopsy
17 to look closely at this injury?

18 A. I did. And there is more than just a linear
19 abrasion.

20 Q. Okay. And is this the only photograph that you
21 were able to find, among the ones that you were shown this
22 morning, that depicts this abrasion?

23 A. I think so.

24 Q. And you had an opportunity to observe the body
25 fully clothed; this is the body unclothed at the autopsy. Is

1 that right?

2 A. That is correct.

3 Q. And she was wearing running shorts when the body
4 arrived at the medical examiner's office; is that right?

5 A. That is correct.

6 Q. Thank you.

7 MR. SEARS: No objection.

8 THE COURT: 25 is admitted.

9 DIRECT EXAMINATION RESUMED

10 MR. BUTNER:

11 Q. You have already described this as being a
12 linear-type abrasion, as part of the component of the injury
13 depicted in Exhibit 25; is that correct?

14 A. Yes, sir.

15 MR. BUTNER: Judge, you did admit 25 already,
16 didn't you?

17 THE COURT: I did.

18 MR. BUTNER: Thank you.

19 Q. What's the rest of the injury that is depicted,
20 please?

21 A. We have ant bites. We have some postmortem
22 nibbling with insect activity on this. So we have ant bites.

23 Q. And do you have an opinion as to how the injury --
24 the linear abrasion occurred in this particular case?

25 A. No specific opinion.

1 Q. Do you have an opinion concerning the mechanism
2 for injury for this linear abrasion?

3 A. Any abrasion occurs when there is friction of the
4 skin against the surface. Because it's linear and has some
5 major dimensions, it's against something that has to have
6 that -- some comparable dimension, but there must be hundreds
7 of things that could do that.

8 Q. Does it need to be a somewhat sharp sort of an
9 object that you're against in order to cause that type of
10 injury?

11 A. No. Just needs to have an edge.

12 Q. Is it the type of thing where if a person were
13 against the corner of the desk, that type of injury could
14 occur?

15 A. Possible.

16 Q. Okay. Now, we have been talking about external
17 injuries. We haven't gotten to the head area, yet, other
18 than discussing the facial injuries from the front; is that
19 correct?

20 A. Yes, sir.

21 Q. Are there other facial injuries from the front
22 that are of significance in this case?

23 A. Well, we have the -- I mixed them in passing. I
24 know we didn't dwell upon them, but we have the blackened
25 eyes --

1 Q. Yes.

2 A. -- the fractured nose and the trauma to the mouth,
3 the laceration of the left forehead. Then the rest of what
4 you see from the front is really more confined over the top
5 and back of the head.

6 Q. Okay. These frontal injuries, are they indicative
7 of one blow or more than one blow?

8 A. At least -- at least two. We could conceivably
9 have one major blow to take care of nose and mouth. But that
10 wouldn't fit the forehead, so we have to have at least two
11 blows to get the forehead included.

12 Q. So at least two blows. One would be the nose and
13 mouth, and the other, you are saying, would then be to the
14 left forehead; is that correct?

15 A. Yes, sir.

16 Q. And are there things that indicate that there may
17 have been more than one blow, in your opinion?

18 A. Well, to account for those I could -- I like to do
19 the minimum amount of things I have to implicate in anything.

20 And we have -- you could say, well, maybe we
21 had other blows for the eyes. Well, maybe you did, but we
22 have other injuries that can account for the damage to the
23 eyes.

24 So in terms of the specific frontal
25 facial blows, I don't have to have more than two.

1 Q. So we have at least two blows?

2 A. At least two.

3 Q. All right. Now, moving to other part of the head,
4 so to speak, do you have a photograph there that you believe
5 depicts those injuries best for your purposes, so to speak?

6 A. Take some of these in order, I guess.

7 Exhibit 1.

8 Q. What is depicted in Exhibit 1?

9 A. Exhibit 1 is the uncleaned face, early on in the
10 exam, viewing from the right side to show the cheek, the --
11 right side of the face -- and two lacerations of the frontal
12 and right parietal scalp.

13 Q. Okay. And this photo was taken at the time of the
14 autopsy?

15 A. It was taken -- actually, it's taken while the
16 body is still in the body bag, before I actually transfer it
17 to the table to rinse the bloody surfaces off. It's very
18 early on in the autopsy, but at the time of autopsy.

19 Q. Prior to you actually beginning with the autopsy
20 process, so to speak. This was --

21 A. Yes, sir.

22 Q. -- step one; is that correct?

23 A. Very early.

24 MR. BUTNER: I'd move for the admission of
25 Exhibit 1.

1 THE COURT: Objections?

2 MR. SEARS: No objection.

3 THE COURT: One is admitted.

4 BY MR. BUTNER:

5 Q. And the next photograph of these injuries to the
6 head that you think is of significance?

7 A. Let's go to Exhibit No. 2 -- it makes sense, since
8 we go from 1 to 2 -- and 2 is at the autopsy table.

9 The body has now been moved to the table.
10 And it includes a ruler, and it shows lacerations. And you
11 can also see fractured portions of bone, as the photo is
12 looking at the left side of the head. At the bottom of the
13 ruler is the left ear. Above it are at least three separate
14 areas of lacerations, some of them converging.

15 Q. Okay.

16 MR. BUTNER: I would move for the admission of
17 Exhibit 2.

18 MR. SEARS: Question on voir dire, your Honor?

19 THE COURT: You may.

20 VOIR DIRE EXAMINATION

21 BY MR. SEARS:

22 Q. Do you know who took that photograph, in your
23 hands, Doctor?

24 A. No. As far as I recall, all of the photos were
25 taken by the same individual. I just don't know who it was

1 that was doing it. It was from the sheriff's office.

2 Q. I'm sorry. I thought you said that you took some
3 photos?

4 A. I did take some photos, but these aren't the ones
5 that I took.

6 Q. Do you see any photos that you took among the ones
7 that you were given to look through this morning?

8 A. No.

9 MR. SEARS: No objection.

10 THE COURT: 2 is admitted.

11 DIRECT EXAMINATION RESUMED

12 BY MR. BUTNER:

13 Q. Let's talk about 1, for a moment. That is of the
14 right side of the victim; is that correct?

15 A. Yes, sir.

16 Q. And how many injuries or injury, if you will, are
17 depicted in Exhibit 1?

18 A. Well, you can't really tell so much, because it's
19 very early on. You have another exhibit which actually
20 clarifies that somewhat, and --

21 Q. We might go to that one, then, huh?

22 A. This would be Exhibit No. 3.

23 Q. What is that depiction?

24 A. Exhibit No. 3 is taken at the time of autopsy.
25 And the lacerations and underlying fractures which are

1 depicted in Photograph Exhibit No. 1, now are shown again in
2 Exhibit No. 3, but I have trimmed some of the hair away so
3 that you actually see the margins of the wounds, and you can
4 see at least three different impact areas over the right
5 temporal, frontal temporal, and parietal -- high temporal.
6 So mostly frontal and parietal on the right side.

7 Q. Okay. So if I understand your testimony,
8 Exhibit 3 is a photograph of the right side of the head of
9 the victim at the time of the autopsy.

10 A. Correct.

11 Q. And after you had begun to trim away some hair,
12 and so forth, so that you could get a better look at the
13 injuries?

14 A. Yes, sir.

15 MR. BUTNER: I would move for the admission of
16 Exhibit 3.

17 MR. SEARS: No objection.

18 THE COURT: 3 is admitted.

19 MR. BUTNER: Thank you.

20 Q. And you indicated -- speaking still about
21 Exhibit 3 -- that there were three different impact areas; is
22 that correct?

23 A. Yes, sir.

24 Q. Would you describe those impact areas for us, in
25 terms of their size and so forth.

1 A. They range from -- according to my report -- is
2 two-and-a-half inches to three-and-a-half inches in length.

3 Q. Each one of them?

4 A. I'm sorry. Wait a minute. Wait a minute. I
5 referred to the wrong one. Let me pick up the correct one
6 here.

7 From two-and-a-half to four inches.

8 Q. Okay. And is that -- for example, one injury is
9 two-and-a-half inches long, and then another one is four
10 inches long?

11 A. Yes.

12 Q. And how about the one -- is there one that's in
13 between?

14 A. The one that's in between is not specifically
15 measured.

16 Q. But it's in that same range, then?

17 A. Yes, sir.

18 Q. And do you have an opinion as to what type of
19 mechanism, if you will, caused these types of injuries?

20 A. This is a forceful blunt-force impact with
21 sufficient force to tear the scalp and to fracture the
22 underlying bone. In this case, not only fracture it, but to
23 drive the bone down into the brain, and in some instances
24 actually elevate margins of fractured bone at the edge.

25 Q. Please describe that for us a little bit more in

1 layman's terms, if you will.

2 A. The skull is forming an arch. It's a modified
3 sphere. And so in that curvature, it has some intrinsic
4 strength of its own. And if you strike it enough to break
5 it, you may actually hinge portions of it up.

6 And so we have, in addition to the impact
7 where we tear scalp and break bone down into the underlying
8 tissues, at the edge some of it kicks up.

9 Q. Okay. And sort of lifting portions of the skull;
10 is that correct?

11 A. Yes, sir.

12 Q. When you looked at these injuries to the right
13 side of the skull depicted in Exhibit 3-A, did you begin to
14 formulate an opinion as to what type of object might cause
15 these injuries?

16 A. I did very early on say it's like any blunt-force
17 injury -- it has to be firm.

18 Q. Pardon?

19 A. Has to be firm. Has to have some mass to it. Has
20 to have pretty sharp edges.

21 But there are two kinds of patterns that
22 begin to emerge, as you look at these lacerations. One is a
23 more or less straight line, and the other has more of a
24 curvature to it.

25 But I reserve -- and reserved at the time

1 of the autopsy -- opinion as to what the object could be
2 until I actually look at the bone. The bone is more faithful
3 in its reproduction of the impact than the skin is.

4 Q. And when you say "more faithful in terms of
5 reproduction of the impact," is that because it is harder and
6 more defined, so to speak?

7 A. Yes, sir.

8 Q. And you had not yet really gotten down to looking
9 at the bone; is that correct?

10 A. That is correct.

11 Q. Okay.

12 A. The only bone I have seen at this point is that
13 which is exposed in the depths of the lacerations.

14 Q. So we now have two blows to the face and forehead,
15 so to speak; is that correct?

16 A. Minimum of.

17 Q. Minimum of. And three blows to the right side of
18 the head; is that correct?

19 A. Yes, sir.

20 Q. And those are all separate and distinct blows at a
21 minimum; is that correct?

22 A. Yes, sir.

23 Q. And first of all, if we could back up just a
24 moment, in regard to the blows to the face and left forehead,
25 were those fatal-type blows?

1 MR. SEARS: Your Honor, I object. There is
2 absolutely not a word in Dr. Keen's report, Exhibit 19 in
3 evidence, in which he opines as to which blows, if any, were
4 fatal -- or sequence of the blows. This question asks
5 Dr. Keen for a brand new opinion, which has not been
6 disclosed.

7 THE COURT: Overruled.

8 BY MR. BUTNER:

9 Q. If can you answer my question, Dr. Keen.

10 A. Those facial blows are non-fatal injuries.

11 Q. Okay. And can you tell -- I am not sure if I
12 asked you this before. I will try and ask it in a more clear
13 fashion, if I didn't.

14 Can you tell, on those facial injuries,
15 whether they were before the person died or after?

16 A. These were prior to death.

17 Q. Okay. Now, in regard to these blows to the right
18 side of the head, are these fatal-type blows?

19 MR. SEARS: Same objection, your Honor.

20 THE COURT: Overruled.

21 THE WITNESS: Each of these three
22 independently, and certainly the three in aggregate, would be
23 fatal.

24 BY MR. BUTNER:

25 Q. And can you tell the order in which these blows

1 took place?

2 MR. SEARS: Same objection, your Honor. The
3 entire line of questioning is asking Dr. Keen for the first
4 time for a brand new opinion, about which not a word has been
5 disclosed to the defense. We have absolutely no way to
6 rebut --

7 THE COURT: Overruled.

8 The answer is a yes or a no.

9 THE WITNESS: Repeat the question, please.

10 BY MR. BUTNER:

11 Q. I believe I asked you can you tell the order in
12 which these blows were administered to the victim?

13 A. Not with precision. Early on there is a blow to
14 the right. But which of these three was the first is
15 difficult to tell, because they are separate.

16 Q. Okay. Tell me why you say "early on there was a
17 blow to the right."

18 A. Because a couple of things happen with fractures.
19 See, if you have an existing fracture and then you impose a
20 second fracture, if the fracture line of the second fracture
21 intersects and stops at another line, it can only do that if
22 that first line is already fractured. And we have some
23 evidence of that. And when you look at the bone later, you
24 can see that some lines are already there, so they had to be
25 there early.

1 The other feature that you can -- even if
2 you don't have intersecting lines, the structural integrity
3 to be able to deform this skull, some of the deformation will
4 be easier if you've already deformed it with a preexisting
5 blow. And that goes to some of the issues of other lesions.

6 But of these three, one of these is very
7 early on -- I don't know which one it is, but these are very
8 early on in the attack.

9 Q. Okay. And did you note deformity of the skull?

10 A. Yes, sir.

11 Q. Would you describe that for us, please.

12 A. Well, it's pretty evident, even -- as we already
13 discussed in the frontal facial identification photo, you can
14 see that we lose the usual contour of a forehead.

15 It's further described in terms of
16 depressed fractures, comminuted fractures, bone driven into
17 brain. Those are all deformation of the skull.

18 Q. And where were depressed fractures located on the
19 skull?

20 A. Both right and left.

21 Q. Right and left side of the head?

22 A. Yes, sir.

23 Q. Okay. And then where were the comminuted
24 fractures located?

25 A. The comminuted fractures are in several places --

1 they're over the top of the head -- maybe for definition,
2 here, "comminuted fracture" is a fracture that has a
3 complexity of the way it fractures.

4 It's sort of -- the equivalent of common
5 experience is the effect that you get on a hardboiled egg if
6 you drop the egg and you get this kind of a shattered
7 appearance instead of just a straight-line cut. That's
8 comminuted.

9 And we have a lot of comminuted fractures
10 which are clustered over virtually the top of the head and
11 the sides of the head.

12 We also have -- when you get into the
13 autopsy and actually look inside the skull, we have a lot of
14 comminuted fractures that are in the interface between the
15 face and the base of the skull. The ethmoid plate, the
16 frontal area -- just multiple small fractures in that area.

17 Q. Okay. So we have been speaking about the right
18 side of the head. We talked about depressed and comminuted
19 fractures.

20 And then you talked about fractures where
21 the bone went into the brain, also. Is that a different type
22 of a fracture, so to speak?

23 A. Well, it's the same fracture, it's just that it's
24 a depressed fracture which the impact has driven bone into
25 the brain.

1 Q. And how many of those are there?

2 A. There are at least two on the right side.

3 Q. How about on the left side?

4 A. The left side, it's hard to say which one is
5 which, because they overlap. But there are areas on the
6 left, as well, but there are bilateral areas in which the
7 depression goes into the brain.

8 Q. Let's move to the left side of the skull, now.

9 A. Exhibit No. 2, which we started a moment ago, we
10 mentioned a combination of at least three fractures in this.
11 These show, again, a convergence of multiple lacerations.
12 They are essentially above the ear, in the left temporal and
13 parietal area.

14 And you can see multiple chips of bones
15 in the -- even in this early-on photo, before I do any
16 shaving.

17 Q. Okay. And how many blows did you find to the left
18 side of the head?

19 A. At least three.

20 Q. So we have two blows at a minimum to the face, and
21 three blows at a minimum to the right side, and three blows
22 at a minimum to the left side?

23 A. Yes, sir.

24 Q. And what is the description of these fractures, if
25 you will, to the left side of the head?

1 A. For purposes of reference in the report, these are
2 the fractures that are injuries 3, 4, and 5, on Page 4.

3 In the left temporal parietal scalp,
4 these range from two-and-a-half to three-and-a-half inches in
5 length.

6 And we have comminuted, depressed
7 fractures of the calvarium, and they go -- the extent of
8 these fractures is such that they continue down into the
9 floor of the cranial vault, the base of the skull. And one
10 indication of that is actually also depicted in Photo No. 2,
11 in which the discoloration in the ear canal is due to the
12 hemorrhage in the petrous ridge, because the petrous ridge is
13 also fractured with this.

14 Q. Okay. So the parietal area, that is an area
15 where, alongside --

16 A. Each side and behind the ear. Above and behind
17 each ear is parietal.

18 Q. And you indicated that one of those fractures was
19 of sufficient force where the fracture actually went down
20 into the base of the skull?

21 A. Actually, more than one goes -- they converge as
22 they go down, and the pattern continues down into the base of
23 the skull and into the petrous ridge, which is that area
24 which goes from the ear towards the spinal column.

25 Q. And so would you describe the level of force it

1 took to cause those types of fractures.

2 A. This is a pretty violent or vicious kind of
3 impact.

4 MR. SEARS: I'm sorry. I didn't hear what the
5 witness said, your Honor.

6 THE WITNESS: Violent or vicious type of
7 impact.

8 BY MR. BUTNER:

9 Q. And what type of object or objects, again, would
10 cause that type of -- these types of injuries on the left
11 side?

12 MR. SEARS: Same objection, your Honor. This
13 is all new material from Dr. Keen -- never seen before or
14 never heard before.

15 THE COURT: Overruled.

16 THE WITNESS: Conceivably, you could get these
17 kinds of fractures with any blunt-force object that is big
18 enough.

19 I formulated a different opinion at the
20 time of my autopsy, that I narrowed down that range of
21 everything you could possibly have because of some shapes
22 here. But certainly golf club is still in the running. A
23 baseball bat is not.

24 BY MR. BUTNER:

25 Q. Golf club is, but baseball bat is not.

1 A. Yes, sir.

2 Q. What would exclude a baseball bat, in your
3 opinion?

4 A. I have had, in my experience, several baseball bat
5 head injuries that were fatal, and you wind up with the
6 contour of the bat -- first of all, it's wider than clubs.
7 It has a rounded surface to it.

8 And most of the time, if you have a
9 fracture of the skull that is depressed from the baseball
10 bat, you are pretty much out the end of the bat, the barrel
11 of the bat, and so you wind up with contours that match that
12 kind of shape of object, which we don't in this case.

13 Q. These aren't injuries that a person could sustain
14 as a result of being beaten with fists or anything like that?

15 A. "These." Clarify the "these."

16 Q. "These" on the left side that we're -- are we
17 talking about the left? Yes, on the left side, that we are
18 speaking about, could fists cause these type of injuries?

19 A. No, sir.

20 Q. These are injuries that were caused by some sort
21 of object?

22 A. Yes, sir.

23 Q. And you've excluded the baseball bat as the object
24 because of the contour, shape, so to speak, of the bat?

25 A. Shape and contour of the bat doesn't match the

1 shape or contour of the fractures in this area -- or the
2 lacerations.

3 Q. Okay. And then would you describe the shape of
4 these lacerations, first of all, that you are speaking of?

5 A. They have vertical components. A large portion of
6 this is a vertical tearing of the skin.

7 But when they converge, they split apart,
8 and now you lose what the other surface was. You can't
9 really see what the other surface was in the resulting tear.

10 The underlying bone fractures, though,
11 have both straight lines and curved lines.

12 Q. And that was why you said earlier you wait until
13 you get down to the bony surface, so to speak, before you
14 formulate your opinion, because you get a better definition,
15 so to speak, of the object?

16 A. That would be a fair characterization, yes, sir.

17 Q. Okay. Before we go down to the bony surface, did
18 you observe any other injuries to the skull area while you
19 were at this stage of the examination?

20 A. Not at this stage. They're very rarely apparent
21 at the very next stage -- the very next stage being that I
22 carefully decide where I can make some incisions in the scalp
23 to loosen up scalp so that I can then see the bone.

24 And unlike most autopsies, this case did not
25 require any use of a saw to open the cranial vault. The saw

1 was never applied to the bones of the skull because of the
2 extent of the fracture.

3 Q. There were so many significant fractures, that you
4 didn't need to use a saw?

5 A. Once I released the scalp, all I had to do was
6 lift the broken fragments of bone away, then I could remove
7 the brain and then I could see the cranial vault.

8 Q. Do you have a photograph that assists you in
9 depicting that stage, so to speak?

10 A. Sequentially, there are two. One is Exhibit 17,
11 and one is Exhibit 16.

12 Q. Well, let's start with 16. What is depicted in
13 Exhibit 16?

14 A. 16 is taken at a time where I have now removed --
15 I have opened back, reflected the scalp to show the skull.

16 I have removed the brain tissue, and I am
17 now fitting pieces of bone back together along fracture lines
18 to try to reapproximate the dimensions and locations of the
19 impacts for the fracture.

20 Q. And this photograph was taken during the
21 performance of the autopsy by you?

22 A. It was taken of me. I didn't take it. The
23 autopsy was performed by me. I didn't take the photo.

24 Q. Right. And similarly, is that the case with
25 Exhibit No. 17?

1 A. Yes, sir.

2 Q. This is at the same stage of the autopsy, when
3 you -- you said "reflected." As I understand that, you mean
4 to take the skin away from the bone?

5 A. Yes. I made some incisions, where the -- I
6 utilized lacerations, where they were, but I didn't want to
7 just destroy those. And so I made some cuts in other areas
8 so I could free up the scalp to peel it back.

9 Q. And see what the skull looked like?

10 A. Yes, sir.

11 MR. BUTNER: I'd move for the admission of
12 Exhibit and 17.

13 MR. SEARS: No objection.

14 THE COURT: 16 and 17 are admitted.

15 BY MR. BUTNER:

16 Q. Tell us, now, in Exhibit 16 you indicated that you
17 were able at that point in time to look at the pieces of the
18 skull; is that correct?

19 A. Yes, sir.

20 Q. Would you tell us what you observed.

21 A. What is shown here in 16 is a portion of these
22 fractures. This is right side, right parietal area. And it
23 shows a curving contour superior, a linear component inferior
24 in the fracture, and then it shows some comminuted fracture
25 more to the back.

1 But it duplicates an area which was
2 causing me, again, to keep under consideration the
3 possibility of an object much like or similar to a golf club
4 as being that which impacted.

5 Q. When you pulled the scalp back from the skull, did
6 you note the presence of additional blows to the skull that
7 you had not noticed when you were looking at the skull prior
8 to that?

9 A. No. Actually, each -- each impact to the head
10 resulted in a laceration of the scalp. The extent of the
11 impact, of the underlying damage, is not clearly evident
12 until you actually pull the scalp back. You can see multiple
13 bits of fracture, which are not readily apparent until you
14 pull the scalp back.

15 But there are not fractures which are --
16 would appear to be the result of an impact with a blunt
17 object that didn't lacerate the scalp. So each of them had
18 some laceration. We just have some radiating fractures that
19 are not so clearly visible until you peel the scalp.

20 Q. So before you peeled the scalp, so to speak, how
21 many blows did you note to the skull, then?

22 You have described for us three on the
23 left, three on the right, and two to the face. Were there
24 more than that?

25 A. I think that that's probably covered in here.

1 I listed a series of injuries in my
2 report, but my injuries were more than just the lacerations
3 of the blows here. The injuries I included in my injuries,
4 the nasal fracture, which are blows -- I guess we're still
5 talking about blows.

6 But I accounted for what I thought were
7 ten separate discreet injuries to the head and neck area.

8 Q. Ten separate blows to the head and neck?

9 A. Yes, sir.

10 Q. And we are now talking about the skull, again,
11 that you were observing with the skin peeled back.

12 Would you describe -- you described one
13 of these types of fractures -- or maybe it's a multiple
14 fracture, if you will -- on the right parietal area with a
15 curving component and a linear component, is what you
16 indicated.

17 A. Yes, sir.

18 Q. Could you describe for us basically what the
19 curving -- or do you have a photograph, in fact, of that
20 curving component?

21 A. There are photos that show this specific fracture
22 in the skull reconstruction.

23 Q. Okay. Would you pull one of those out for us,
24 please.

25 A. Exhibit No. 7.

1 Q. Okay. Would you describe what is depicted in
2 Exhibit No. 7.

3 A. Actually, wait a minute. We want to stay with the
4 right side, first?

5 Q. Yes.

6 A. Okay. Let's see what we have got here.

7 THE COURT: I would like to select a good
8 place to stop that you will remember where -- where we're
9 going.

10 MR. BUTNER: Probably now would be a good
11 time, then, because we are at a sort of stage, if you will.

12 THE COURT: I will confirm that we are
13 resuming at ten o'clock on the 28th of November.

14 Give me some idea, gentlemen, between the
15 two of you -- and you can step down in the meantime,
16 Dr. Keen, if you want -- give me some idea of the time that
17 we are going to need to continue the total of the hearing.

18 MR. BUTNER: Judge, this is going slower than
19 I thought it was going to go. I think probably including
20 other witnesses and so forth, the State is going to have
21 another four hours.

22 THE COURT: Does your estimation include
23 anything that the defense is going to do?

24 MR. BUTNER: No.

25 THE COURT: Mr. Sears, any estimations that

1 you can give?

2 MR. SEARS: Well, your Honor, I think that's a
3 bit optimistic.

4 I would imagine to finish Dr. Keen and
5 Mr. Echols, depending on what he's permitted to testify to,
6 Detective Page, and the two sheriff's office detectives in
7 this case, will take all of next Wednesday, with
8 cross-examination.

9 THE COURT: Do you have any conflicts on the
10 following day, the 29th?

11 MR. SEARS: I have a 1:30 appearance in the
12 juvenile court -- which I think I mentioned before in
13 chambers -- for a young man who is in detention. That should
14 be a fairly brief matter, from 1:30 to 2:00.

15 THE COURT: A half-hour hearing?

16 MR. SEARS: I would imagine, if Judge Brutinel
17 can get to us early. That's all I have.

18 THE COURT: Is that in the building, or is
19 that elsewhere?

20 MR. SEARS: That is downstairs in this
21 building.

22 THE COURT: Mr. Butner, anything else that's
23 conflicting for you if we not only use all of Wednesday after
24 ten o'clock -- do you have anything conflicting on Thursday,
25 the 29th or Friday the 30th?

1 MR. BUTNER: Nothing that I am aware of at
2 this moment in time, Judge. Sorry I can't be more specific
3 than that, but I don't think I do.

4 THE COURT: I will plan on the remainder of
5 the day for the 28th, and then we will see how much more we
6 need at that point, depending on, as you say, what other
7 testimony may be presented or precluded.

8 MR. BUTNER: Is that okay for you, Dr. Keen?

9 THE WITNESS: I'm not aware of what my
10 schedule is. I know I've got a couple of subpoenas that are
11 coming up around that time, but I -- I check on my phone, and
12 the 28th looks clear.

13 THE COURT: Okay. As long as we're in on the
14 28th, we'll probably be able to finish the doctor.

15 MR. SEARS: Your Honor, I have a couple of
16 matters regarding scheduling. I would ask that the Court
17 provide us with an expedited transcript of Dr. Keen's
18 testimony from today so that a consulting expert that we
19 would have would have an opportunity to review his testimony,
20 particularly if it looks like we would then go into Thursday
21 and that witness would either have to prepare a report or
22 appear to testify on Thursday; otherwise, it is going to be
23 very difficult for us to have that witness available and
24 fully apprised of what Dr. Keen has said thus far in this
25 case. So I would make that request.

1 THE COURT: I don't know what Roxanne's other
2 obligations are.

3 THE COURT REPORTER: I can do it.

4 THE COURT: She can do it.

5 MR. SEARS: Thank you, your Honor.

6 The second thing is I would ask that the
7 Court seal the exhibits from today's hearing, not to be
8 opened.

9 THE COURT: I will direct that the Court
10 itself will retain the exhibits and they won't be available
11 to anybody else. If you need to see them, you can make
12 arrangements with me.

13 MR. SEARS: Thank you, your Honor. That is
14 even a better solution. Thank you.

15 THE COURT: I will hang on to all of the
16 admitted exhibits, the ones that were marked from the
17 photographs, so that they are not available to the general
18 public.

19 Other issues, you said?

20 MR. SEARS: Your Honor, were you implying that
21 if we didn't finish on the 28th, we would need time on 29th
22 to try --

23 THE COURT: Or 30th. I just want to keep my
24 options open and know what else you folks have that might
25 conflict.

1 MR. SEARS: It has something to do, also, with
2 availability of any witnesses that we might want to call, and
3 it would be helpful if we could assume that if we didn't
4 finish on the 28th, we would go right to the 29th.

5 THE COURT: That would be my present
6 expectation, given what my schedule is. As I said, my trial
7 next week went off, fortunately for all of us. And
8 Mr. Butner's did not go off for this week; otherwise, I would
9 be wading into tomorrow.

10 Thank you, Dr. Keen. You may step down.
11 We'll see you 10:00 a.m. on Wednesday, the 28th. If you
12 would let Mr. Butner know if there is any conflict based on
13 your other subpoenas, I would appreciate that.

14 Stand in recess.

15 (Whereupon, these proceedings were concluded.)

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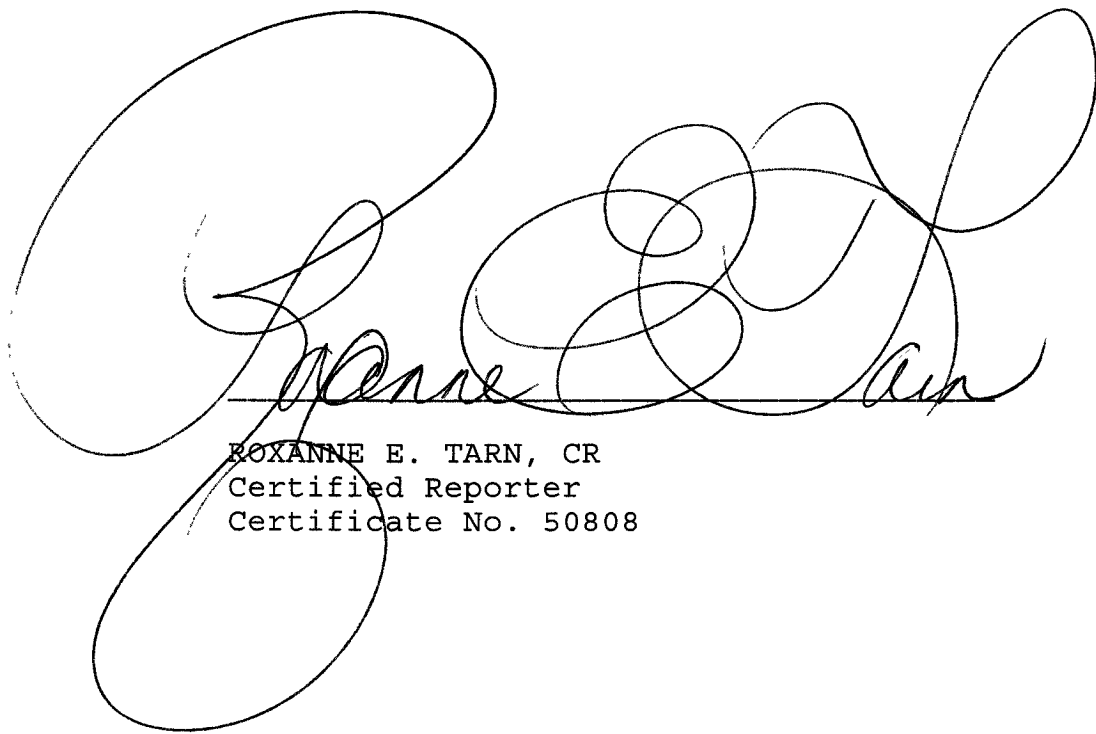
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C E R T I F I C A T E

I, ROXANNE E. TARN, CR, a Certified Reporter
in the State of Arizona, do hereby certify that the foregoing
pages 1 - 83 constitute a full, true, and accurate transcript
of the proceedings had in the foregoing matter, all done to
the best of my skill and ability.

SIGNED and dated this 21st day of October,
2009.

A large, stylized handwritten signature in black ink, appearing to read 'Roxanne E. Tarn', is written over a horizontal line. The signature is highly cursive and loops around itself.

ROXANNE E. TARN, CR
Certified Reporter
Certificate No. 50808